APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and All Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petition for Certiorari Filed May 21, 1968
Certiorari Granted October 21, 1968

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APPENDIX TO THE BRIEFS

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COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OTTO R. COBURN
on behalf of himself and all others similarly situated,
Plaintiffs,
vs.
GAS SERVICE COMPANY,
a Delaware Corporation,
Defendant.

Case No. T-4172

(Filed December 13, 1966)

Comes now plaintiff and alleges the following claim for relief:

1. Plaintiff is a citizen of the State of Kansas with his residence and post office address at R.F.D. No. 3, Arkansas City, Kansas. Defendant is a corporation organized under the laws of the State of Delaware with its principal office and place of business at 700 Scarritt Building, Kansas City, Missouri. Defendant is authorized to engage in business in the State of Kansas and its registered agent for service of process is Signor J. Fink, 200 West Sixth Street, Topeka, Kansas. This is an action between citizens of different states with an amount in controversy in excess of $10,000.00, exclusive of interest and costs.

2. The defendant has for the past fifteen (15) years or more, marketed natural gas to citizens of the State of Kansas residing or having their burner-tip outlets outside the city limits of various cities in the State of Kansas, and the plaintiff is one of the defendant's customers so situated. The persons constituting the class similarly situated with the plaintiff, exceed 18,000 in number and are

so numerous that the joinder of all members is impracticable; there are questions of law and fact in this action common to the class; the claim of the plaintiff is typical of the claims of other members of the class; and the prosecution of this action by the plaintiff will fairly and adequately protect the interests of the class. There exists one or more of the conditions described in subdivisions (1), (2) and (3) of Rule 23 (b), Federal Rules of Civil Procedure, and by reason thereof, this action is properly brought by the plaintiff as a class action.

3. Plaintiff has maintained his residence continuously at the location described above, outside the city limits Arkansas City, Kansas, since the year 1954, and has continuously purchased natural gas from the defendant for consumption outside the city limits. Defendant has charged and billed the plaintiff and all other members of the class and has been paid for the volume of natural gas consumed or properly charged to the plaintiff's account computed according to the defendant's gas metering device.

4. On the monthly billings prepared and sent by the defendant to each of its customers constituting a member of the class and including the plaintiff, the defendant has included and has compelled the plaintiff and other members of the class to pay an additional charge designated under various hearings, but usually termed, a "franchise tax." The charge to the account of the plaintiff and all other consumers similarly situated who are members of the class and reside or maintain the point of gas consumption outside the city limits, and the billing and collection of such amounts and taxes by the defendant was and is unlawful and unauthorized because such "franchise taxes" were actually franchise revenues or duties on city franchise rights of the defendant which were unlawfully and arbitrarily extended and charged to consumers of natural gas at points outside the city limits.

5. The exact amount of the unlawful charges made by the defendant and collected from the plaintiff and the other members of the class is unknown to the plaintiff, but is far in excess of the jurisdictional amount of $10,000. The exact amount of such unlawful and unauthorized charges and collections is exclusively within the knowledge of the defendant and should be reflected accordingly in its books and records.

WHEREFORE, plaintiff prays:

(a) That the court determine this to be a class action properly instituted under Rule 23, Federal Rules of Civil Procedure;

(b) That the plaintiff recover judgment for himself and all other members of the class against the defendant in the amounts properly due each member of the class as the result of the defendant's unlawful and unauthorized imposition and collection of the charges described in this complaint, together with interest at 6% per annum from the date of each collection until repayment.

(c) That the court determine and award reasonable and proper attorney fees for the prosecution of this action on behalf of the plaintiff and all other members of the class; and

(d) for the recovery by plaintiff and other members of the class of the costs of this action, including the reasonable costs of discovery and accounting, and for such other and further relief as plaintiff or the class may be shown to be entitled.

MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Same Title]

(Filed January 30, 1967)

Comes now the defendant and moves the Court for an order dismissing this action for want of jurisdiction over the subject matter for the following reasons:

1. Paragraph 1 of plaintiffs' complaint predicates jurisdiction upon 28 U.S.C. 1332 which requires that in actions between citizens of different states the amount in controversy shall exceed the sum of $10,000.00, exclusive of interest and costs.

2. As shown by the attached Affidavit of Jerry T. Duggan, Executive Vice President of defendant, the maximum amount in controversy between the named plaintiff and defendant can not exceed or equal the sum of $10,000.00.

3. For purposes of determining the amount in controversy herein the claim of plaintiff may not be aggregated with the claims of any other persons similarly situated. *Matzen* v. *Socony Mobil Oil Company, Inc.*, Case No. W-3426, United States District Court for the District of Kansas, opinion of The Honorable Wesley E. Brown.

WHEREFORE, defendant prays that this action be dismissed at the cost of plaintiff.

AFFIDAVIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Same Title]

(Filed January 30, 1967)

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

I, Jerry T. Duggan, being first duly sworn on my oath, state:

1. That I am Executive Vice President and General Counsel of The Gas Service Company, defendant in civil action No. T-4172, pending in the United States District Court for the District of Kansas, and I am authorized and empowered to make this Affidavit on behalf of The Gas Service Company.

2. That I have caused an investigation to be made of all sums collected by The Gas Service Company from Otto R. Coburn, the plaintiff named in said civil action, as charges in addition to the sums owing by Otto R. Coburn for natural gas delivered to his residence at R.F.D. No. 3, Arkansas City, Kansas, which said additional charges are described in Paragraph 4 of the Complaint in said civil action No. T-4172.

3. That from the investigation so made I have determined that commencing with the bill sent to Otto R. Coburn for gas service during the month of April, 1964, there was added to the charge made to Otto R. Coburn for gas service an additional charge, representing Otto R. Coburn's pro rata share of a franchise tax imposed by the City of Arkansas City, Kansas, and that on each bill rendered to the said

Otto R. Coburn subsequent to April, 1964, up to and including the bill rendered for gas service during the month of February, 1966, an additional charge was added to each bill rendered to Otto R. Coburn for the same purpose. The sums owing by Otto R. Coburn for natural gas delivered to his premises, plus the additional sums added thereto for sales tax imposed by the State of Kansas and for Otto R. Coburn's pro rata share of the franchise tax imposed by the City of Arkansas City, Kansas, as aforesaid, for each month subsequent to April, 1964, as stated on each bill rendered to the said Otto R. Coburn, were as follows:

Date of Bill	Charges for Natural Gas	Franchise Tax	Sales Tax	Total
April, 1964	13.64	.68	.36	14.68
May, 1964	4.41	.22	.12	4.75
June, 1964	3.46	.17	.09	3.72
July, 1964	1.56	.08	.04	1.68
Aug., 1964	-0-*	-0-	-0-	-0-
Sept., 1964	-0-	-0-	-0-	-0-
Oct., 1964	2.99	.15	.08	3.22
Nov., 1964	2.99	.15	.08	3.22
Dec., 1964	12.02	.60	.32	12.94
Jan., 1965	14.87	.74	.39	16.00
Feb., 1965	16.30	.82	.43	17.55
Mar., 1965	15.82	.79	.42	17.03
Apr., 1965	15.82	.79	.42	17.03
May, 1965	3.94	.20	.12	4.26
June, 1965	1.56	.08	.05	1.69
July, 1965	1.56	.08	.05	1.69
Aug., 1965	1.56	.08	.05	1.69
Sept., 1965	1.56	.08	.05	1.69
Oct., 1965	2.99	.15	.09	3.23
Nov., 1965	3.93	.20	.12	4.25
Dec., 1965	9.15	.46	.29	9.90
Jan., 1966	9.62	.48	.30	10.40
Feb., 1966	16.26	.81	.51	17.58
(Totals)	156.01	7.81	4.38	168.20

*No service was rendered during the months of August and September, 1964, so no bills were sent.

4. That no sums were added to monthly bills submitted to Otto R. Coburn as and for his pro rata share of the franchise tax imposed by the City of Arkansas City, Kansas, or by any other city, after the bill rendered for service during the month of Febuarry, 1966, and the total of all sums added to bills rendered to Otto R. Coburn, and paid by him to The Gas Service Company for franchise taxes was $7.81, as shown in the next preceding paragraph.

Further, Affiant sayeth not.

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Same Title]

(Filed May 29, 1967)

Templar, District Judge:

Plaintiff Coburn, a citizen of Kansas, on behalf of himself and all others similarly situated, brought this action against defendant Gas Service Company, a Delaware Corporation, with principal offices and place of business in Kansas City, Missouri, alleging that the amount in controversy exceeds $10,000, and that defendant markets gas to citizens of Kansas having their residence and burner-tip outlets outside the city limits of various cities in the State of Kansas, and that plaintiff is one of the defendant's customers so situated. It is further alleged that the persons constituting the class similarly situated with plaintiff exceed 10,000 in number and are so numerous that the joinder of all members is impracticable; that there are questions of law and fact in this action common to the class; the claim of the plaintiff is typical of the claims of other members of the class; and the prosecution of this

action by the plaintiff will fairly and adequately protect the interests of the class. It is further alleged that there exists one or more of the conditions described in sub-divisions (1), (2) and (3) of Rule 23(b), Federal Rules of Civil Procedure, and by reason thereof the action is properly brought by the plaintiff as a class action.

It is further alleged that plaintiff along with the other members of the class have purchased natural gas from defendant for consumption outside of the city limits of any incorporated city and that defendant has charged them, billed them and has been paid for a large volume of natural gas consumed; that the charges included, and plaintiff and other members of the class have been compelled to pay, an additional charge designated as a "franchise tax"; that the billing and collection of the apportioned amount of said tax to the plaintiff and those in his class is unlawful and unauthorized because such "franchise tax" are revenues or duties on city franchise rights of defendant which it has arbitrarily extended and charged to customers at points outside the city limits; it is further alleged that the amount of unlawful charges collected by defendant from plaintiff and members of the class is in excess of the jurisdictional amount of $10,000; plaintiff prays that the Court determine this to be a class action properly instituted under Rule 23 of F.R.C.P.

Defendant has filed a motion to dismiss on the grounds that plaintiff's complaint predicates jurisdiction upon 28 U.S.C. §1332 which requires that an action between citizens of different states, the amount in controversy shall exceed the sum of $10,000 exclusive of interest and costs. Attached to the motion and made a part of it is the affidavit of an officer of the defendant corporation stating that plaintiff Coburn's pro rata share of franchise tax from April 1964 to February 1966 inclusive, amounts to $7.81. No chal-

lenge is made of plaintiff's contention that the total amount so collected and received by defendant from all members of the class exceeds the sum of $10,000.00. Defendant further alleges that for purposes of determining the amount in controversy herein the claim of the plaintiff cannot be aggregated with the claims of any other persons similarly situated.

Thus, brought into sharp focus is the question of whether the amounts claimed to be recoverable by the class, in event plaintiff's claim is sustained for the class, may be aggregated for the purpose of sustaining the Court's jurisdiction.

The action is sought to be maintained under Rule 23 of the Federal Rules of Civil Procedure as amended, which amendment became effective July 1, 1966. This Court has endeavored to get a fair statement of reasons for changing the rule, but after considerable research concludes that the Advisory Committee's note found at 39 F.R.D. 98 describes the terms used by the Court as a basis for classification of various kinds of class action and states that they proved to be obscure and uncertain and so an amended rule describing "in more practical terms the occasion for maintaining class actions" and providing that all class actions maintained to the end as such will result in judgments including those whom the Court finds to be members of the class, whether or not the judgment is favorable to the class, and refers to the measures which can be taken to assure the fair conduct of these actions.

Whether the situation has been improved by the establishment of amended Rule 23 remains to be seen. The problem presented in this case remains to be spelled out.

The Advisory Committee observed that the categories of class actions in the original rule were defined in terms

of the abstract nature of the rights involved: the so-called "true category" was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights relating to "specific property"; and the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the "class suit device" and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. The Committee also observed that in practice the terms "joint", "common", etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain, and that the Courts had considerable difficulty with these terms. It was further observed that the Rule did not provide an adequate guide to the proper extent of judgments in class actions.

It was noted by the Committee that the original Rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class.

The Court's research on this problem includes its consideration of the statement by Professor Wright found on page 89 of the 1966 pocket part to Volume 2, Barron & Holtzoff's Federal Practice and Procedure, wherein he discusses directly the problem now before the Court. He says:

> "The greatest difficulty comes with regard to jurisdictional amount. As a function of the general principle that aggregation is permitted by parties jointly or commonly interested, but not where claims are sev-

eral and distinct, it was held under the former rule that aggregation of the claims of all members of the class was permitted in 'true' class action, where the rule required a 'joint' or 'common' interest, but not in 'hybrid' or 'spurious' class action. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversy'. A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.

"If the Courts continue to apply the ancient learning, it will be necessary to consider in each case, in which the claims of the named representatives are not themselves for more than $10,000, whether the interests involved are 'joint' or 'common', an inquiry which is frequently quite difficult and which it was a purpose of the amended rule to avoid. If the interests are joint or common, then the relation of the parties will be such that their action would fall under (b) (1), but it does not follow that all (b) (1) actions will involve joint or common interests."

Before the amendment to Rule 23, a class action brought on behalf of numerous persons having a *joint* or *common interest* or *title* in the subject matter of the suit could, where the value of the interest involved exceeded the jurisdictional amount, be maintained in a Federal District Court. *Clark* v. *Paul Gray, Inc.*, 306 F.2d 323, *Bolsenberg* v. *Chicago Title & Trust Company*, 128 F.2d 245, Anno. 141 A.L.R. 565.

On the other hand, where the right exists in favor of many as against one, or in favor of one as against many, and in its nature is separable, then the separable values

could not be added together to make the jurisdictional sum, and the separable value furnished the jurisdictional test. *Elliott* v. *Empire Natural Gas Co.*, 4 F.2d 493, 497, *Clark* v. *Paul Gray, Inc.*, (supra).

It is reasonable to conclude that the able and competent persons who were responsible for the change in Rule 23, had in mind some improvement in the utilization of the Federal Rules of Civil Procedure as now formulated and adopted, presumably their recommendations were considered by the Supreme Court of the United States, else the amended rule would not have been adopted. Clearly, the defects of the prior rule were to be eliminated.

To adopt the position urged by defendant here has the effect of nullifying what this Court believes is the object and purpose of the amended rule. As this Court views the situation, if defendant's theory is adopted, plaintiff here and those situated with him are limited to the permissive joinder authorized by Rule 20. Surely, the distinguished members of the advisory committee, not to mention the Supreme Court, had something other than this in mind when Rule 23 was modified, otherwise Rule 23 as a practical matter could have been eliminated.

The revisors of the rule acknowledged the difficulty encountered in the use of such terms as "joint", "common" or "secondary" and these features were eliminated from the new rule, Likewise if the Committee's note is to be given any weight, the distinctions of "true", "spurious" and "hybrid" class actions were removed. This is borne out by the statement on page 100 of 39 F.R.D.,

> "The difficulties which would arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device."

And this is submitted in connection with the statement (p. 103) that in cases where the Court finds that the questions common to the class predominate over the questions affecting individual members that economies can be achieved by the class-action device.

In the case at bar the questions presented would be common to the class. There is no conceivable question that could otherwise predominate here. The Court can see no obstacle to a finding that the questions common to the class predominate over the questions affecting individual members. Furthermore, the conditions required by Rule 23 appear to exist under the allegations in the complaint.

Defendants place their reliance upon the case of *Matzen* v. *Socony Mobil Oil Company, Inc.*, case W-3426 (unreported), where the Court held that claims united in a class action which are not joint but which, in fact, are separate claims of the individual persons, cannot be aggregated to sustain removal from state court. The rule announced in *Matzen* follows the decision of the Tenth Circuit Court of Appeals in *Aetna Insurance Company* v. *Chicago, Rock Island & Pacific Railroad Co.*, 229 F.2d 584, a case decided before Rule 23 was amended. Significantly, the *Matzen* opinion reads:

> "We hold that aggregation in class suits must be determined by the principles which have heretofore governed aggregation in non-class suits. The claims must be not only common in the sense of a community of interest in the rights asserted, they must be undivided in the sense that they constitute in their totality an integrated right."

The above statement is the correct statement of law, as it existed before Rule 23 was amended. If it be declared the law under amended Rule 23, then there was no

purpose in amending the rule for the reasons given by the revisors.

This Court has studied the opinion in the case of *Alvarez et al.* v. *Pan American Life Insurance Company*, No. 22902, March 27, 1967, decided by the Fifth Circuit Court of Appeals, a copy of which was furnished to the Court by defendant's counsel. It is fairly obvious that if the law announced in *Alvarez* is to be followed, then amended Rule 23 serves little useful purpose. To support the law announced, the Fifth Circuit was required to fall back on the classifications developed under former Rule 23, now condemned and rescinded.

To sustain *Alvarez*, the Court found it necessary to conclude that Rule 82 furnishes the basis for rejecting jurisdiction under Rule 23. It says:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts . . ."

The Fifth Circuit then falls back on interpretations applied to the jurisdictional problems by the Courts in dealing with "true", "hybrid", or "spurious" classifications which were eliminated by the amended rule.

If it is to be the law that this Court can entertain a class action only when each member of the class to be bound has a claim for more than the jurisdictional amount, that rule should be clearly announced. Support should not rest on rules developed under the former Rule 23. The new rule seems designed to give the trial court substantial discretion in determining whether at the outset, the action can be maintained and if so, to what extent the judgment rendered shall apply. Rule 23(d) is a broad outline of procedure and provides for orders the Court may make in conducting a class action.

The authors of the amended rule must have taken into account the possibility that the position contended for by plaintiff here would result in an unwarranted extension of federal jurisdiction when they placed in the Committee note the following statement (p. 104):

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. . ."

The uncertainty of the proper application of present Rule 23 indicates that an early interpretation of it should be clearly made.

The Court will deny the motion of defendant to dismiss for the reason that in the judgment of this Court, none of the grounds stated in the motion to dismiss are sufficient to require dismissal.

The Court will, if application is timely made, permit an appeal to be taken from this order as provided by 28 U.S.C. 1292(b).

Prevailing counsel will prepare, circulate and submit order to be approved and entered by the Court, and which, when entered, shall constitute the order of the Court denying defendant's motion to dismiss.

DATED at Topeka, Kansas this 29th day of May, 1967.

/s/ George Templar
United States District Judge

ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Same Title]

(Filed June 23, 1967)

On April 14, 1967, the parties appeared by and through their respective counsel of record and presented oral argument to the court on defendant's motion to dismiss for lack of jurisdiction.

During the course of argument it was stipulated by counsel for the parties that the amount of the plaintiff's claim is less than $10,000, and that counsel for plaintiff at this time is not aware of any member of the class whom plaintiff seeks to represent whose individual claim would equal or exceed $10,000.

After hearing argument of counsel, the matter was taken under advisement by the court.

Thereafter, having examined the pleadings, the briefs, and being duly advised in the premises, the court issued its Memorandum and Order on the 29th day of May, 1967, which memorandum having been filed with the clerk is incorporated herein and made a part hereof by reference.

For the reasons set forth in the aforesaid memorandum,

IT IS BY THE COURT ORDERED that defendant's motion to dismiss for lack of jurisdiction should be, and it hereby is, overruled.

The court finds and is of the opinion that the above ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and

that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

Upon application timely made, the defendant may appeal from this order as provided in 28 U.S.C. 1292(b).

/s/ George Templar
Judge

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Same Title]

(Filed August 1, 1967)

Notice is hereby given that Gas Service Company, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the order overruling defendant's motion to dismiss, entered in this action on the 23rd day of June, 1967.

ORDER GRANTING APPLICATION FOR LEAVE TO APPEAL FROM THE ORDER OF THE DISTRICT COURT OVERRULING THE MOTION TO DISMISS THE COMPLAINT

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

January Term, 1968

THE GAS SERVICE COMPANY,
Appellant,

vs.

OTTO R. COBURN, on behalf of himself and all others similarly situated,
Appellee.

No. 9635
No. I. A. 50
(No. T-4172 Civil)

(Filed July 28, 1967)

ELEVENTH DAY, JULY TERM, WEDNESDAY, JULY 26th, 1967

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on application for leave to appeal from an order of the United States District Court for the District of Kansas in the above entitled cause and was submitted to the court.

On consideration whereof, it is now here ordered that said application of Gas Service Company for leave to appeal from an order of the United States District Court for the District of Kansas in the above entitled cause be and the same is hereby granted and that the notice of appeal shall be filed with the United States District Court for the

District of Kansas within the time fixed by Rule 73(a), Federal Rules of Civil Procedure, for taking an appeal or within ten days from this date, whichever is later.

It is further ordered that a certified copy of this order be transmitted to the clerk of the United States District Court for the District of Kansas.

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Same Title]

No. 9635

February 23, 1968

Before WOODBURY, LEWIS and HICKEY, Circuit Judges,

LEWIS, CIRCUIT JUDGE:

This is an interlocutory appeal authorized in compliance with 28 U.S.C. § 1292(b) to allow appellate consideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. § 1332 where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption out-

side the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding $10,000, and that such individual claims are variable in amount[1] but would aggregate to more than $10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitively meets each prerequisite to a class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).[2] The class

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1. By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was $7.81.

2. The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment[8] would not

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(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

3. The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

have been classified as a "true" class action and aggregation of claims would not have been permitted. *See* Aetna Ins. Co. v. Chicago Rock Island & Pac. R.R., 10 Cir., 229 F.2d 584. The Fifth Circuit in Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, has held that this result is still dictated after adoption of the new rule. Citing Clark v. Paul Gray, Inc., 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,[4] the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F.2d at 995. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In Gibbs v. Buck, 307 U.S. 66, 72, the Supreme Court stated it thus:

> ". . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

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(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

4. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.[5] The Advisory Committee's Note, 39 F.R.D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true," "hybrid," and "spurious." "In practice," said the Committee, "the terms 'joint,' 'common,' etc. which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in Provident Bank v. Patterson, ... U.S. ....., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensible parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to

5. Clark v. Paul Gray, Inc., 306 U.S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, Gibbs v. Buck, *supra*, and it follows, under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy.[6]

The judgment is affirmed and the cause remanded for further proceedings.

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6. Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

ORDER

DENYING REHEARING EN BANC

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges

[Same Title]

(Filed March 26, 1968)

This cause came on to be heard on the petition of appellant for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing en banc be and the same is hereby denied.

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable Peter Woodbury, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judge

[Same Title]

(Filed March 26, 1968)

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing be and the same is hereby denied.

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